



[Billing Code 7709-02-P]

## **PENSION BENEFIT GUARANTY CORPORATION**

### **Approval of Special Withdrawal Liability Rules: the Service Employees International Union Local 1 Cleveland Pension Plan**

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Notice of Approval.

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**SUMMARY:** The Service Employees International Union Local 1 Cleveland Pension Plan requested the Pension Benefit Guaranty Corporation (PBGC) to approve a plan amendment providing for special withdrawal liability rules for employers that maintain the Plan. PBGC published a Notice of Pendency of the Request for Approval of the amendment. In accordance with the provisions of the Employee Retirement Income Security Act of 1974, as amended (ERISA), PBGC is now advising the public that the agency has approved the requested amendment.

**ADDRESSES:** A copy of the plan's complete request may be requested from the Disclosure Officer, Pension Benefit Guaranty Corporation, 1200 K Street NW, Suite 11101, Washington, DC 20005 (fax 202-326-4042).

**FOR FURTHER INFORMATION CONTACT:** Bruce Perlin, Assistant Chief Counsel ([Perlin.Bruce@PBGC.gov](mailto:Perlin.Bruce@PBGC.gov)), 202-326-4020, ext. 6818 or Jon Chatalian, Deputy Assistant Chief Counsel ([Chatalian.Jon@PBGC.gov](mailto:Chatalian.Jon@PBGC.gov)), ext. 6757, Office of the Chief Counsel, Suite 340, 1200 K Street N.W., Washington, DC 20005-4026; (TTY/TDD users may call the Federal relay service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4020.)

## **SUPPLEMENTARY INFORMATION:**

### **Background**

The Pension Benefit Guaranty Corporation (PBGC) administers title IV of the Employee Retirement Income Security Act of 1974 (ERISA).

Under section 4201 of ERISA, an employer that completely or partially withdraws from a defined benefit multiemployer pension plan becomes liable for a proportional share of the plan's unfunded vested benefits. The statute specifies that a “complete withdrawal” occurs whenever an employer either permanently (1) ceases to have an obligation to contribute to the plan, or (2) ceases all operations covered under the plan. See ERISA section 4203(a). Under the first test, an employer that remains in business but no longer has an obligation to contribute to the plan will incur withdrawal liability. Under the second test, an employer that closes or sells its operations will also incur withdrawal liability. The “partial withdrawal” provisions of sections 4205 and 4206 impose a lesser measure of liability upon employers who reduce, but do not eliminate, the obligations or operations that generate contributions to the plan. The withdrawal liability provisions of ERISA are a critical factor in maintaining the solvency of these pension plans and reducing claims made on the multiemployer plan insurance fund maintained by PBGC. Without withdrawal liability rules, an employer that participates in an underfunded multiemployer plan would have a powerful economic incentive to reduce expenses by withdrawing from the plan.

Congress nevertheless allowed for the possibility that, in certain industries, the fact that particular employers go out of business (or cease operations in a specific geographic region) might not result in permanent damage to the pension plan's contribution base. In the construction industry, for example, the funding base of a pension plan is the construction projects

in the area covered by the collective bargaining agreements under which a pension plan is maintained. Even if the amount of work performed by a particular employer fluctuates markedly in any given year, individual employees will typically continue to work for other contributing employers in the same geographic area. Consequently, the withdrawal of an employer does not remove jobs from or damage the pension plan's contribution base unless the employer continues to work in the geographic area covered by collective bargaining agreement without contributing to the plan.

Although the general rules on complete and partial withdrawal identify events that normally result in a diminution of the plan's contribution base, Congress recognized that, in certain industries and under certain circumstances, a complete or partial cessation of the obligation to contribute normally does not weaken the plan's contribution base. This reasoning led Congress to establish special withdrawal rules for the construction and entertainment industries.

Section 4203(b)(2) of ERISA provides that a complete withdrawal occurs only if an employer ceases to have an obligation to contribute under a plan and the employer either continues to perform previously covered work in the jurisdiction of the collective bargaining agreement or resumes such work within five years without renewing the obligation to contribute. In the case of a plan terminated by mass withdrawal (within the meaning of ERISA section 4041(A)(2)), section 4203(b)(3) provides that the five-year restriction on an employer resuming covered work is reduced to three years. Section 4203(c)(1) of ERISA applies the same special definition of complete withdrawal to the entertainment industry, except that the pertinent jurisdiction is the jurisdiction of the plan rather than the jurisdiction of the collective bargaining agreement. In contrast, the general definition of complete withdrawal in section 4203(a) of

ERISA includes the permanent cessation of the obligation to contribute regardless of the continued activities of the withdrawn employer.

Congress also established special partial withdrawal liability rules for the construction and entertainment industries. Under section 4208(d)(1) of ERISA, “[a]n employer to whom section 4203(b) (relating to the building and construction industry) applies is liable for a partial withdrawal only if the employer’s obligation to contribute under the plan is continued for no more than an insubstantial portion of its work in the craft and area jurisdiction of the collective bargaining agreement of the type for which contributions are required.” Under section 4208(d)(2) of ERISA, “[a]n employer to whom section 4203(c) (relating to the entertainment industry) applies shall have no liability for a partial withdrawal except under the conditions and to the extent prescribed by the [PBGC] by regulation.”

Section 4203(f) of ERISA provides that PBGC may prescribe regulations under which plans that are not in the construction industry may be amended to use special withdrawal liability rules similar to those that apply to construction plans. Under the statute, the regulations shall permit the use of special withdrawal liability rules only in industries that PBGC determines have characteristics that would make use of the special withdrawal liability rules appropriate. ERISA section 4203(f)(2)(A). In addition, each plan application must show that the special rule will not pose a significant risk to the PBGC. ERISA section 4203(f)(2)(B). Section 4208(e)(3) of ERISA provides that a plan may adopt rules for the reduction or elimination of partial withdrawal liability — under regulations prescribed by PBGC — subject to PBGC’s determination that such rules are consistent with the purpose of ERISA.

PBGC’s regulation on Extension of Special Withdrawal Liability Rules (29 CFR Part 4203) prescribes the procedures a multiemployer plan must follow to request PBGC approval of

a plan amendment that establishes special complete or partial withdrawal liability rules. The regulation may be accessed on PBGC's Web site (<http://www.pbgc.gov>). Under 29 CFR § 4203.3(a), a complete withdrawal rule must be similar to the statutory provision that applies to construction industry plans under section 4203(b) of ERISA. Any special rule for partial withdrawals must be consistent with the construction industry partial withdrawal provisions.

Each request for approval of a plan amendment establishing special withdrawal liability rules must provide PBGC with detailed financial and actuarial data about the plan. In addition, the applicant must provide PBGC with information about the effects of withdrawals on the plan's contribution base. As a practical matter, the plan must show that the characteristics of employment and labor relations in its industry are sufficiently similar to those in the construction industry that use of the construction rule would be appropriate. Relevant factors include the mobility of the employees, the intermittent nature of the employment, the project-by-project nature of the work, extreme fluctuations in the level of an employer's covered work under the plan, the existence of a consistent pattern of entry and withdrawal by employers, and the local nature of the work performed. PBGC will approve a special withdrawal liability rule only if a review of the record shows that:

(1) The industry has characteristics that would make use of the special construction withdrawal rules appropriate; and

(2) The adoption of the special rule will not pose a significant risk to the PBGC.

After review of the application and all public comments, PBGC may approve the amendment in the form proposed by the plan, approve the application subject to conditions or revisions, or deny the application.

## **The Request**

PBGC received a request, dated September 16, 2011, from the Service Employees International Union Local 1 Cleveland Pension Plan (the “Plan”), for approval of a plan amendment providing for special withdrawal liability rules. Subsequently, the Plan requested that PBGC suspend review of the amendment. On January 24, 2014, the Plan requested that PBGC again consider the amendment and provided updated actuarial information. PBGC published a Notice of Pendency of the Request for Approval of the amendment on August 19, 2015 (80 FR 50339). PBGC’s summary of the actuarial reports provided by the Plan may be accessed on PBGC’s Web site (<https://www.pbgc.gov/prac/pg/other/guidance/multiemployer-notices.html>).

The Plan is a multiemployer pension plan covering the commercial building cleaning and security industries in the greater Cleveland, Ohio area. The Plan represents in its submission that the industry for which the rule is requested — the commercial building cleaning industry — has characteristics similar to those of the construction industry. According to the Plan’s submission, the principal similarity is that when a contributing employer’s contract to clean a building expires, the cleaning work will generally continue to be performed by employees covered by the Plan, irrespective of the employer retained to perform the cleaning services. Under the proposed amendment, a complete withdrawal of an employer whose employees perform substantially all work in the commercial building cleaning industry will occur only when: (a) the employer ceases to have an obligation to contribute under the Plan and (b) the employer continues to perform work in the jurisdiction of the Plan of the type for which contributions were previously required or resumes such work within five years after the date on which the obligation to contribute under the plan ceases and does not renew the obligation at the time of the resumption. Additionally,

the proposed amendment provides that a withdrawal from the Plan occurs if an employer sells or otherwise transfers a substantial portion of its business or assets to another individual or entity that performs work in the jurisdiction of the Plan of the type for which contributions are required without having an obligation to make contributions to the Plan. In the case of termination by mass withdrawal (within the meaning of ERISA section 4041A(a)(2)), the proposed amendment provides that section 4203(b)(3), permitting a construction employer to resume covered work after three years of withdrawal instead of the standard five-year restriction, is not applicable to withdrawing commercial building cleaning industry employers. Therefore, in the event of a mass withdrawal, there is still a five-year restriction on resuming covered work in the jurisdiction of the Plan.

The request includes the actuarial data on which the Plan relies to support its contention that the amendment will not pose a significant risk to the insurance system under Title IV of ERISA. The Plan submitted actuarial valuation reports for Plan years 2007-2014. Although the Plan's financial condition deteriorated after the 2007-2008 financial crisis, the Plan immediately took action to increase employer contributions, by diverting contributions allocated to other employee benefit plans.<sup>1</sup> In 2011, the Plan's funding percentage and other tests of financial health placed the Plan in the Green zone (strongest category) and the Plan has been in the Green zone since.<sup>2</sup> Although the number of active participants in the Plan dropped 19% between 2007

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<sup>1</sup> Under the Pension Protection Act of 2006 (PPA), the Plan would have certified as in critical status (Red zone) in 2009, but instead elected to freeze its 2008 Green zone status for one year pursuant to the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA).

<sup>2</sup> Updated actuarial information became available after the Notice of Pendency, and PBGC reviewed 5500s and Actuarial Valuation Reports for Plan years 2015-2016, which confirmed the Plan was still in the Green zone.

and 2013 (while retirees decreased 6%), contributions increased 13% over the same time period.<sup>3</sup>

To date, the Plan's active participant base remains solid – about 36% of the participant population – and contributions remain steady.

### **Decision on the Proposed Amendment**

The statute and the implementing regulation state that PBGC must make two factual determinations before it approves a request for an amendment that adopts a special withdrawal liability rule. ERISA section 4203(f); 29 CFR § 4203.5(a). First, on the basis of a showing by the plan, PBGC must determine that the amendment will apply to an industry that has characteristics that would make use of the special rules appropriate. Second, PBGC must determine that the plan amendment will not pose a significant risk to the insurance system. PBGC's discussion on each of those issues follows. After review of the record submitted by the Plan, and having received no public comments, PBGC has entered the following determinations.

#### *1. What is the Nature of the Industry?*

In determining whether an industry has the characteristics that would make an amendment to special rules appropriate, an important line of inquiry is the extent to which the Plan's contribution base resembles that found in the construction industry. This threshold question requires consideration of the effect of employer withdrawals on the Plan's contribution base.

As the Plan has asserted, covered work must be performed at a commercial building located in the Cleveland, Ohio region. The work is local in nature and generally continues to be

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<sup>3</sup> During Plan years 2014-2016, active participants decreased by another 5% (while retirees decreased 6%). The number of separated vested participants increased in recent years, but the average monthly benefit of these participants is less than the average monthly benefit of the current retiree population. Additionally, the updated actuarial information demonstrates a commitment to sustained contributions, as evidenced by a 5% increase in the average employer contribution rate between 2013 and 2015.



covered by the Plan regardless of the employer retained to do those services. An employer ceases to have an obligation to contribute when it loses a cleaning or security contract because the building owner outsources the work or retains a different service provider, or when the employer closes its business due to bankruptcy, retirement, or business relocation. Over the past 10 years, cessation of contributions by any individual employer has not had an adverse impact on the Plan's contribution base. Most of the employers that have ceased to contribute have been replaced by another employer who begins contributions for the same employees at the same location for the same work. The Plan presented historical data supporting the notion that building contract employer withdrawals have not negatively affected the Plan's contribution base.

**2. *What is the Exposure and Risk of Loss to PBGC and Participants?***

*Exposure.* Although the Plan's financial condition deteriorated as a result of the 2007-2008 financial crisis, the Plan sponsor took assertive actions to help the Plan recover, significantly increasing contributions in Plan years 2010 and 2011. As a result, in 2011 the Plan's actuary determined that the Plan's financial health placed it in the Green zone and the Plan continues to be in the Green zone to date. Active participants in the Plan decreased by 19% from 2007 to 2013 (and retirees decreased by 6%), but contributions increased by 13% over the same time period. Thus, the parties have worked to preserve an adequate cushion against market downturns.

*Risk of loss.* The record shows that the Plan presents a low risk of loss to PBGC's multiemployer insurance program. The Plan and the covered industry have unique characteristics that suggest that the Plan's contribution base is likely to remain stable. Contributions to the Plan are made with respect to commercial buildings in the greater Cleveland

area. Plan representatives presented data demonstrating that building cleaning contracts for covered employment under the collective bargaining agreement have changed hands approximately 20-25 times during the past 18 years, and the rate at which a new signatory employer has assumed a prior signatory employer's building contract and has hired the prior employer's employees to clean the same building is 90-92%. Accordingly, the data substantiates the Plan's assertion that the contribution base is secure and the departure of one employer from the Plan is not likely to have an adverse effect on the contribution base so long as the number of buildings covered does not decline.

### **Conclusion**

Based on the Plan's submissions and the representations and statements made in connection with the request for approval, PBGC has determined that the plan amendment adopting the special withdrawal liability rules (1) will apply only to an industry that has characteristics that would make the use of special withdrawal liability rules appropriate, and (2) will not pose a significant risk to the insurance system. Therefore, PBGC hereby grants the Plan's request for approval of a plan amendment providing special withdrawal liability rules, as set forth herein. Should the Plan wish to amend these rules at any time, PBGC approval of the amendment will be required.

**W. Thomas Reeder**

Director

Pension Benefit Guaranty Corporation

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